

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JAN HUGO STENBECK	:	DETERMINATION
	:	DTA NO.816170
for Redetermination of a Deficiency or for Refund of	:	
New York City Personal Income Tax under the New York	:	
City Administrative Code for the Year 1991.	:	

Petitioner, Jan Hugo Stenbeck, c/o Anchin, Block & Anchin, L.L.P., 1375 Broadway, New York, New York 10018-7001, filed a petition for redetermination of a deficiency or for refund of New York City personal income tax under the New York City Administrative Code for the year 1991.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 29, 1998 at 10:30 A.M. with all briefs to be submitted by May 7, 1999, which date began the six-month period for the issuance of this determination. Petitioner appeared by Leonard Schneidman, Esq., and Bernard Rappaport, C.P.A. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Justine Clarke Caplan, Esq., of counsel).

ISSUE

Whether petitioner was domiciled in New York City in 1991.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner, Jan Hugo Stenbeck, a Notice of Deficiency, dated September 11, 1995, asserting a 1991 New York City personal income tax deficiency in the amount of \$250,778.00 plus penalty and interest.

2. The Notice of Deficiency was issued as the result of an audit of petitioner’s 1991 New York State and City personal income tax return. On that return, petitioner listed his mailing address as 1021 Park Avenue, New York, New York and his school district name as Manhattan. Although no other address or evidence of residence outside New York City was provided, petitioner filed a City of New York nonresident earnings tax return.

3. On March 18, 1995, an auditor mailed a residency questionnaire to petitioner at the Park Avenue address shown on his 1991 tax return. The Division received no reply to its request that he complete this questionnaire.

4. On June 5, 1995, the auditor prepared a post office request for verification of petitioner’s address. Whether a response was ever received is not known. The auditor also reviewed Cole’s directory from which he determined that petitioner maintained telephone service at the Park Avenue address from 1984 through 1993. The auditor also determined that petitioner filed his State income tax return under the status married filing separately on separate returns. The Division’s records showed that petitioner’s wife filed a separate return from an address in Glen Head, New York.

5. The audit report contained a typewritten summary of the audit results which included findings of fact. According to this report, petitioner filed his 1992 New York tax return using the address 153 East 53rd Street, #5500, New York, New York. On June 9, 1995, the auditor mailed

an appointment letter to petitioner at that address. The appointment was scheduled in the Division's offices on June 30, 1995. Included with the letter was a request for certain documents: a power of attorney if necessary, Federal income tax returns, deeds or leases for all residences, canceled checks and bank statements, utility bills for all residences, information regarding school registration if petitioner had children, a detailed schedule of days spent in and out of New York City, and credit card receipts and statements. The auditor also requested that petitioner complete a residency questionnaire which was provided.

6. On June 27, 1995, the auditor received a letter signed by Nancy Guevara, Secretary, which states: "I am writing in connection with your letter to Mr. Stenbeck, a copy of which is attached. Mr. Stenbeck gave up his residence in the United States in January 1993. I have forwarded your correspondence to him in Luxembourg where he is now a resident."

7. On June 30, 1995, the auditor faxed to Ms. Guevara a Consent Extending the Period of Limitation for Assessment of Personal Income Tax, and she acknowledged having received it. The statutory period for issuing a notice of deficiency to petitioner for 1991 was to expire on October 15, 1995.

8. The auditor placed a telephone call to Ms. Guevara on July 18, 1995. She informed the auditor that petitioner left the United States in 1993. She also told the auditor that in 1991 and 1992 petitioner resided at 1021 Park Avenue. The auditor was told that petitioner would respond to his requests. The auditor spoke with Ms. Guevara on August 3, 1995 and August 14, 1995 in an attempt to obtain a consent to extend the period of limitations on assessment and more information regarding petitioner's residence status. The auditor's Findings of Fact state: "During the course of the audit, auditor spoke to Nancy a few times. She did not provide any

information regarding taxpayer. All she replied were that taxpayer left the United State [sic] in January 1993 and all the mails were received and forwarded.”

9. On August 15, 1995, the auditor visited the building located at 1021 Park Avenue and spoke with the doorman who informed the auditor that petitioner had resided at that location for about 10 years ending sometime in 1993. The doorman stated that petitioner left no forwarding address.

10. A search of the Division’s records disclosed that petitioner’s spouse filed a separate New York State and City income tax return listing her address as Cedar Swamp Road, Glen Head, New York, which is on Long Island. The auditor testified that he telephoned the residence and spoke to two unidentified employees. He testified:

First I spoke to a lady. She doesn’t know Mr. Stenbeck resided there. And then I spoke to a man. And he said he just works there. I asked him about Mr. Stenbeck. He told me clearly that Mr. Stenbeck did not live there and he further told me if you want to contact him, the place to contact him is in New York City, which is his office.

The auditor’s contemporaneous log of conversations and other contacts made in connection with the case contains the following entry for August 16, 1995: “Called [taxpayer’s spouse’s telephone number] spoke to people worked at [sic] there. Taxpayer is outside this country for vacation at this time & will be back in September. He is still working in NYC at his company at 153 E 53 St # 5500.” In a separate handwritten document (apparently, a memorandum to the audit file), the auditor noted that the man he spoke to stated that “Jan did not live at the Glen Head residence.”

11. At this point, the auditor’s supervisor telephoned Ms. Guevara, and, according to the auditor’s log, “Nancy changed her mind & gave auditor taxpayer’s office address & tel # in Sweden.” A final letter requesting information and execution of a consent extending the period

of limitations on assessment of personal income tax was faxed to petitioner in Sweden. No response was received. The auditor contacted Ms. Guevara two days later, August 18, 1995, but, again, no information was forthcoming.

12. Petitioner's State income tax return shows income from interest, dividends, capital gains, taxable refunds, and other income totaling \$5,892,661.00. He reported no wage or salary income or business income. The amount of income in the category of "other income" was reported to be \$98,326.00, and the source of that income was described as director's fees. Petitioner claimed one personal exemption and itemized deductions in the amount of \$158,534.00. His New York State taxable income was shown as \$5,642,932.00.

On his nonresident earnings tax return, petitioner claimed to have spent 142 days in New York City during 1991, and he reported New York City net earnings from self-employment of \$98,326.00. Presumably, this represents the director's fees reported as other income, but no information is provided regarding the source of that income. Petitioner calculated and paid New York City nonresident earnings tax of \$639.00. Petitioner did not allocate his New York City income in accordance with schedules provided for this purpose.

13. Based on the information provided in petitioner's 1991 personal income tax return and its own investigation, the Division concluded that petitioner was a resident individual of New York City in 1991 and that his New York State income was also subject to the New York City personal income tax. The Division issued to petitioner a Statement of Personal Income Tax Audit Changes dated August 18, 1995. This was mailed to petitioner at his business address in New York City, 153 East 53rd Street. The statement shows the computation of the additional tax liability of \$250,778.77 plus the imposition of penalties and interest. In the remarks section of the statement, it explains that petitioner is deemed to be a New York City resident pursuant to

New York City Administrative Code § 11-1705.¹ When no response was received to this statement, a Notice of Deficiency was issued.

14. Following a conciliation conference in the Bureau of Conciliation and Mediation Services, a Conciliation Order, dated July 25, 1997, was issued by the Division sustaining the Notice of Deficiency.

15. A petition protesting the Notice of Deficiency was filed in the Division of Tax Appeals on October 22, 1997. It was signed by petitioner's representative. In that petition, it was claimed that petitioner was not domiciled in New York City in 1991 and was, in fact, domiciled in Sweden in that year. Petitioner admitted owning and maintaining the Park Avenue residence but claimed that his use of the apartment as living quarters was occasional and limited. The petition states that petitioner stayed at his family home located at Cedar Swamp Road, Glen Head, New York when in residence in New York State.

16. The following explanation of petitioner's business interests was provided in the petition:

The Petitioner is the Chairman of the Board of Directors of *Industriforvaltnings AB Kinnevik*, "Kinnevik", an international foreign conglomerate with extensive holdings and locations worldwide. Kinnevik is headquartered in Stockholm, Sweden. The Petitioner's base of operations is located in Stockholm, Sweden. Kinnevik affiliates, subsidiaries and business groups are maintained in fifty nine (59) separate locations throughout the continents of Europe, North America, South America, Asia and Australia. The Petitioner's duties, responsibilities and obligations require constant travel to these far flung locations annually. During the year 1991, the Petitioner visited the United States affiliates located within New York City as well as other cities in other parts of the United States.

¹ The New York City Administrative Code § 11-1705(b) defines a New York City resident as an individual who is either domiciled in New York City or maintains a permanent place of abode in New York City and spends more than 183 days of the taxable year in the City.

17. Petitioner admitted being present in the United States on 168 days in 1991 but claimed that he was not present in New York City on all of these days. Petitioner attached to the petition a schedule prepared by the Division. It shows that petitioner admitted being present in New York City on 168 days in 1991 and outside of New York City on 197 days.

18. A hearing was scheduled for 10:30 A. M. on October 29, 1998. Prior to commencement of the hearing, petitioner's representatives presented the Division with documentation showing the number of days spent by petitioner in and out of New York City. This documentation consists of copies of receipts from an American Express corporate credit card issued to Kinnevik Corporation in Sweden; 1991 year-end summaries of credit card charges for an American Express corporate account in petitioner's name and an American Express card in petitioner's name; credit card statements for 1991 for a First Card AB account issued to Kinnevik in Sweden; pages from petitioner's passport; and invoices from a travel agent billing petitioner for airline tickets. On a summary sheet prepared by petitioner's representatives (the "day count"), the total number of days in New York City is shown as 109.² Based on this documentation, the Division conceded at the outset of the hearing that petitioner was not present in New York City on 183 days in 1991; however, the Division did not agree that petitioner had documented that he was present in New York City on only 109 days. Instead, it asserted that petitioner was in the City on 168 days as originally conceded by petitioner (apparently, during the conciliation conference). Moreover, the Division took the position that the burden of proof is on petitioner to establish that he was not domiciled in New York City in 1991.

² A day in New York, as calculated by petitioner, did not necessarily mean an overnight at the Park Avenue apartment. For instance, a day was counted as a New York City day if documents showed that petitioner was present in New York City to have dinner or to arrive or depart from Kennedy or La Guardia airports.

19. At the outset of the hearing, petitioner's representatives stated that they were unprepared to offer proof on the issue of domicile since they had been under the impression that the only issue was whether petitioner was present in New York City on 183 days or more.³ The only evidence offered by petitioner at hearing was documentation showing days spent by petitioner in and out of New York City as described in Finding of Fact "18".

20. Claiming that they were unaware that domicile was one of two issues to be addressed at hearing, petitioner's representatives requested an opportunity to submit affidavits in support of petitioner's claim that he was not domiciled in New York City in 1991. This request was granted over the Division's objection, and petitioner was given until December 1, 1998 to submit affidavits and documents in support of the petition. The Administrative Law Judge ruled that the Division could respond to petitioner's proof in one or more of three ways: first, the Division could file written objections to the evidence submitted; second, the Division could submit affidavits or other evidence in reply to petitioner's proof; third, the Division could request a continuance of the hearing in order to present its own witnesses or to cross-examine petitioner's affiants. The Division was given until January 15, 1999 to respond to any proof submitted.

21. On December 1, 1998, petitioner submitted his own affidavit; the affidavit of his wife, Merrill Stenbeck; an affidavit from an employee at Mayville Farm, Jerry Quinn; an affidavit from the Stenbeck children's nanny, Essie Evans; and various documents including: Long Island Lighting Co. ("LILCO") bills for 1991, New York Telephone and AT&T bills for 1991; enrollment contracts from the school attended by petitioner's children; and miscellaneous invoices from businesses located near Mayville Farm. When the Division did not respond to

³ The Hearing Memorandum submitted by the Division on May 28, 1998 includes petitioner's domicile as one of two issues in dispute.

this submission, this Administrative Law Judge informed the parties, by letter dated January 29, 1999, that petitioner's proof had been received in evidence and that the record was closed.

22. Petitioner is a Swedish citizen; however, he has maintained one or more residences in New York State for many years. In 1975, he resided at 170 East 73rd Street in New York City. On June 19, 1975, he purchased the property at Cedar Swamp Road, Glen Head, Long Island which he refers to as the Mayville Farm. These facts were taken from a deed for transfer of the Mayville Farm property to petitioner, dated June 19, 1975. The deed was contained in the audit report which was entered into evidence and was apparently provided to the Division at the conciliation conference.

23. Petitioner owned the apartment located at 1021 Park Avenue from 1984 through 1993.

24. Petitioner has many business interests all over the world. He is the director of many United States and foreign corporations, including: Great Universal Incorporated; Industriförvaltnings A.B. Kinnevik; NetCom Systems AB; Modern Times Group MTG AB and Millicom International Cellular, S.A. Several of his companies are headquartered at 153 East 53rd Street in New York City. Petitioner used this address as well as the address of the Park Avenue apartment on financial and tax documents.

25. Petitioner and his wife, Merrill Stenbeck, were married at the Mayville Farm in 1976, and they have made their home there ever since. The couple has four children: Christina born in 1977; Hugo born in 1979; Sophia born in 1980; and Max born in 1985. Each attended the Green Vale School in Green Vale, Long Island.

26. Several additions have been made to the Mayville Farm over the years. In the early 1980s, a second floor was added to the garage which connected the garage to the main house. In the early 1990s, the main wing of the house was rebuilt, and in 1996 the Stenbecks purchased the

neighboring farm which was made a part of Mayville Farm. A large terrace was added for dining and entertaining. A pool, gazebo, tennis court and a platform tennis court were installed, and a living room and master bedroom were added to the original floor plan.

27. Petitioner kept many of his personal effects at Mayville Farm, including cars, clothing and three bassett hounds. Petitioner and his wife entertained friends at Mayville Farm and had many good friends in the Glen Head community.

28. Petitioner is a member of the Seashanhaka Corinthian Yacht Club on Long Island and the Piping Rock Country Club and was a member of these clubs in 1991. Petitioner submitted an invoice from the Beaver Dam Winter Sports Club, Locust Valley, New York, dated December 31, 1991. It is addressed to petitioner at Cedar Swamp Road and shows his member number as S081.

29. Copies of service invoices from LILCO, New York Telephone and AT&T show that in 1991 service was maintained at Mayville Farm under petitioner's name. The Division's auditor noted that the telephone number (shown in the audit report as 516-671-8910) at Mayville Farm was listed under Mrs. Stenbeck's name; however, the 1991 telephone bills for account number 516-671-8910 928 270 are addressed to Jan H. Stenbeck, Cedar Swamp Road, Glen Head, New York.

30. For the past 20 years, Mr. Quinn has worked for the Stenbecks at Mayville Farm as a handyman, gardener and driver. He asserts that petitioner spent most of his time at the Mayville Farm when he was not traveling abroad. He also states that petitioner would spend his mornings making telephone calls from Mayville Farm to Europe.

31. Ms. Evans now lives in South Carolina, but worked for petitioner and Mrs. Stenbeck from 1975 to 1992 at Mayville Farm. She was the nanny for the Stenbecks' four children and

lived at Mayville Farm. She asserts that petitioner lived at Mayville Farm when in the country and that he was an active parent who had breakfast and dinner with his children almost every day when he was at Mayville Farm. Both petitioner and Mrs. Stenbeck recall that on numerous occasions petitioner visited the school attended by petitioner's children to attend sporting events, special performances, graduation ceremonies and meetings.

32. Mrs. Stenbeck states that petitioner used the Park Avenue apartment approximately once a week when he was in the country. She states that she also used the apartment on occasion when she was in the City to attend concerts, the theater or have dinner.

33. Petitioner describes his pattern of living as one in which he traveled extensively abroad, lived at and conducted business from the Mayville Farm when he was in the United States and used the Park Avenue apartment as a *pied-à-terre*. He sold the apartment in 1993 because he did not use it enough to justify keeping it.

34. Credit card statements which were originally intended to support petitioner's claim of days in and out of New York City prove that he was in New York City on 13 days in 1991. There are 10 charges on his personal American Express Card for restaurants in the City and two charges to stores located in the City. A single charge to a restaurant was made in 1991 on an American Express corporate card. In addition, petitioner charged an annual fee for HBO satellite services in the amount of \$402.10.

35. Petitioner submitted four invoices from businesses located on Long Island. An account was maintained under his name at Brooks Drugs, Inc. in Old Brookville, New York, and an invoice and seven receipts were submitted showing charges to this account. Invoices bearing petitioner's name were submitted from a lumber yard, a hardware store and a nursery service.

These show sales to Jan H. Stenbeck, Cedar Swamp Road, in 1991. Some were paid by credit card, some by cash and some by check.

36. Petitioner submitted AT&T monthly itemized phone bills for service at Mayville Farm for all of 1991. There were three calling numbers shown under the same account number: 671-8910 (the number called by the auditor) , 671-8911 and 671-6346. This Administrative Law Judge compared these documents with other documents in the record to determine whether they supported petitioner's claim of domicile at the Mayville Farm and concluded that they did.

37. Petitioner claimed that when he was present in the United States he spent the majority of his time at the Mayville Farm and that he conducted business from that location. If true, an analysis of the long-distance telephone service should have shown numerous calls placed to locations outside the United States when petitioner claimed to be in the States and many fewer calls when he was abroad. This was the case.

38. AT&T long-distance telephone charges for three months in 1991 were examined closely and compared with the day count prepared by petitioner's representatives.

(a) The day count shows that petitioner was outside of the United States from January 1, 1991 to January 15, 1991 and in the United States for the remainder of the month. The AT&T telephone bills show 33 long distance phone calls placed from Mayville Farm from January 1, 1991 through January 15, 1991. Of these, 12 calls were placed to locations outside the United States. From January 16, 1991 through January 31, 1991, 126 long-distance calls were dialed from one of the two Mayville Farm numbers. Of these, 100 phone calls were placed to locations outside the United States.

(b) The day count for March 1991 claims that petitioner spent the entire month abroad. In that month, 86 long-distance phone calls were placed and 41 of these were to a location outside the United States.

(c) The day count for November 1991 shows that petitioner was in the City on 17 days between November 1, 1991 and November 21, 1991 and outside the City on 13 days in that month. In the period when petitioner was in the United States, 119 long-distance telephone calls were placed from Mayville Farm. Of these, 91 were placed to foreign countries and 28 were placed to locations within the United States. During the period when petitioner was abroad, 24 long-distance telephone calls were placed, and 16 of these were to locations outside the United States.

39. Copies of selected pages of AT&T telephone charges for service at petitioner's Park Avenue apartment in 1991 were included in the audit report placed in evidence. Apparently, these were provided to the Division in connection with the conciliation conference. The bill for October 1991 was compared with the AT&T telephone bills for Mayville Farm and the day count for the same month.

(a) In the period October 1, 1991 through October 4, 1991, petitioner conceded being in New York City. During this period, no long-distance phone calls were placed from the Park Avenue apartment. Three domestic and three foreign long-distance phone calls were placed from Mayville Farm.

(b) Petitioner's summary shows that he was traveling abroad from October 6, 1991 through October 15, 1991. In this period, no long-distance telephone calls were placed from the Park Avenue apartment. Eight long-distance telephone calls were placed to locations in the

United States from Mayville Farm, and ten calls were placed to locations outside the United States.

(c) From the period October 16, 1991 through October 31, 1991, petitioner's summary shows that he was in New York City on each day except Saturdays and Sundays (October 19, 20, 26 and 27). Long distance telephone calls were placed from the Park Avenue apartment on three of those days. Twelve calls were placed on October 22, 1991; eleven calls were made on October 29, 1991; and nine calls were made on October 30, 1991. Long-distance phone calls were made on each and every day during this period from Mayville Farm. Sixty-three calls were placed to locations outside the United States, and seventeen calls were placed to locations within the United States, for a total of eighty phone calls.

SUMMARY OF THE PARTIES' POSITIONS

40. Petitioner claims that he has provided compelling evidence that demonstrates his longstanding and continuous intent to make his permanent home at the Mayville Farm located on Cedar Swamp Road in Glen Head, New York. He argues that he was not required to show a change of domicile from the Park Avenue apartment to Mayville Farm because he never considered the Park Avenue apartment to be his domicile, but rather used the apartment as a business convenience.

41. The Division argues that petitioner was historically domiciled in New York City and has not carried his burden of proof to show a change of domicile to Mayville Farm. The factors relied on by the Division to demonstrate domicile in New York City include petitioner's ownership of the Park Avenue apartment from 1984 through 1993, petitioner's use of the Park Avenue address on tax returns and other financial documents and petitioner's identification of his residence as New York, New York on his passport. The Division cites these as evidence of

petitioner's intent to hold himself out as a New York City resident in 1991. In addition, the Division maintains that petitioner has failed to introduce sufficient documentary evidence demonstrating a domicile in Glen Head, i.e., his driver's license, bank records, credit cards, wills, safe deposit boxes, insurance, voter registration, New York City parking exemption, and auto registration. Finally, the Division claims that a taxpayer cannot prevail in a domicile case without providing actual testimony to prove his intent.

CONCLUSIONS OF LAW

A. The New York City Administrative Code § 11-1705(b) defines a New York City resident as follows:

Resident individual. A resident individual means an individual:

(A) who is domiciled in this city, unless (1) he maintains no permanent place of abode in this city, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this city. . . or

(B) who is not domiciled in this city but maintains a permanent place of abode in this city and spends in the aggregate more than one hundred eighty-three days of the taxable year in this city, unless such individual is in active service in the armed forces of the United States.

The definition of a New York State "resident" is identical to the City resident definition, except for the substitution of the term "state" for "city." (*See*, Tax Law § 605[b][1].)

B. The Division's assertion of tax liability is premised entirely on subsection (A) of New York City Administrative Code § 11-1705(b). That is, the Division does not contend that petitioner spent 183 days or more in New York City during the audit years. Rather, the Division's only assertion is that petitioner has not established by clear and convincing evidence that he was not domiciled in New York City in 1991.

C. Neither the Tax Law nor the New York City Administrative Code contains a definition of domicile, but a definition is provided in the regulations of the New York State Department of Taxation and Finance (*see*, 20 NYCRR 105.20[d]).⁴ As relevant, it provides as follows:

Domicile. (1) Domicile, in general, is the place which an individual intends to be his permanent home - - the place to which he intends to return whenever he may be absent.

(2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of his former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation in some other place.

* * *

(4) A person can have only one domicile. *If he has two or more homes, his domicile is the one which he regards and uses as his permanent home.* In determining his intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out in subdivision (a) of this section, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though he may be domiciled elsewhere. (Emphasis supplied.)

It is well established that an existing domicile continues until a new one is acquired, and the burden of proof to show a change in domicile rests upon the party alleging the change (*see, Matter of Newcomb's Estate*, 192 NY 238).

D. The auditor's conclusion that petitioner was domiciled in New York City in 1991 was based on several factors. The most significant is petitioner's failure to respond to the Division's

⁴ The definition of "domicile" in the Division's current regulations cited above, effective January 29, 1992, is the same as the definition in the former income tax regulations.

requests for information. Faced with a tax return which identified petitioner's address as 1021 Park Avenue, New York, New York, and no information whatever to suggest that petitioner maintained a permanent home anywhere but New York City, the Division reasonably concluded that petitioner was domiciled in New York City in 1991. It must be noted, however, that the Division's investigation into petitioner's residency status lasted less than three months,⁵ and took place during a period of time when petitioner was no longer living in New York City and was traveling outside the United States.

E. The Division asserts that petitioner has not proven that he is domiciled in Glen Head, New York, by the standard of clear and convincing evidence. The Division's position is based, in part, on its argument that testimony is essential in a domicile case in order to allow cross-examination of witnesses. It urges that the affidavits offered by petitioner be afforded little weight since petitioner and the other affiants were not available for cross-examination and, according to the Division, the affidavits are similar in content and lack the details needed to determine domicile.

Findings of Fact "20" through "36" of this determination were based primarily upon the affidavits and documents submitted by petitioner. That evidence was determined to be a reliable basis for the findings of fact for the reasons that follow.

First, the regulations of the Tax Appeals Tribunal authorize the submission of affidavits in lieu of oral testimony (20 NYCRR 3000.15[d]), and findings of fact may be made on the basis of affidavits (*see, Matter of Orvis v. Tax Appeals Tribunal*, 86 NY2d 165, 630 NYS2d 680 *cert*

⁵ It may reasonably be concluded that petitioner never received the first letter sent to him at the Park Avenue address, since he moved from that address in 1993 and left no forwarding address. The Division's first contact with petitioner took place on June 27, 1995 when Nancy Guevara responded to a letter sent to petitioner on June 9, 1995. The Notice of Deficiency was issued on September 11, 1995

denied 516 US 989, 133 L Ed 2d 426; **Matter of Seguin**, Tax Appeals Tribunal, October 22, 1992). Affidavits, like testimony, must be scrutinized and weighed with other relevant evidence in the record to determine their ultimate value (*see, Matter of Orvis v. Tax Appeals Tribunal, supra; Matter of Erdman*, Tax Appeals Tribunal, April 6, 1995). However, the mere fact that evidence is offered through an affidavit is not in itself a basis for disregarding that evidence (*Matter of Seguin, supra*).

Second, the affidavits and other evidence submitted by petitioner were not discredited by the Division although it was provided with ample opportunity to do so. The procedure established at hearing enabled the Division to respond to proof submitted by petitioner by objecting to the evidence submitted, submitting evidence in rebuttal or requesting a continuation of the hearing. A continuation would have enabled the Division to cross-examine petitioner and the other affiants and to present its own witnesses and evidence in rebuttal to petitioner's proof. If petitioner did not agree to be available at the continuation, the Division had the right to subpoena petitioner (20 NYCRR 3000.7). Since the Division did not avail itself of the opportunity to continue the hearing or to submit its own additional evidence, I will not take a negative inference from petitioner's failure to testify.

F. Clear and convincing evidence consists of proof in the form of testimony, affidavits, or documents which is of a quality that a reasonable mind would accept as adequate to support a conclusion or ultimate fact on the record considered as a whole; the proof must be of a substantial nature and have the ability to inspire confidence (*Matter of Mobley v. Tax Appeals Tribunal*, 177 AD2d 797, 576 NYS2d 412, *lv denied* 79 NY2d 978, 583 NYS2d 195). Based upon this standard, I conclude that petitioner's proof is sufficient to show that he was not domiciled in New York City in 1991.

The Division's assertion that petitioner was historically domiciled in New York City so that he was required to show a change in domicile from the City to Mayville Farm is rejected. According to a deed transferring the property, petitioner purchased Mayville Farm in 1975. Accordingly, his ties with Mayville Farm are longstanding. Petitioner submitted evidence demonstrating that since his marriage in 1976 he considered Mayville Farm to be his permanent home. Petitioner and Mrs. Stenbeck were married at Mayville Farm in 1976. Their four children were raised at Mayville Farm and attended school nearby. Mr. Stenbeck belonged to the Seawanhaka Corinthian Yacht Club and the Piping Rock Country Club on Long Island. The Stenbecks made several additions and improvements to Mayville Farm over the years and purchased additional property to increase its size in 1996. Petitioner kept his personal effects, including his three dogs, at Mayville Farm. When he was present in the United States, he spent most of his time at Mayville Farm and conducted business over the telephone from Mayville Farm. Petitioner's wife, handyman and ex-nanny swear in their affidavits that petitioner lived with his family at Mayville Farm whenever he was in the United States.

The affidavits were supported by documentation. Enrollment contracts and billing invoices from Green Vale School establish that petitioner's children attended school on Long Island. Bills show that electric and telephone service provided to Mayville Farm were billed to petitioner in 1991. Billing invoices show that petitioner patronized local businesses in 1991.

The detailed telephone bills from AT&T showing direct dialed telephone calls placed from Mayville Farm generally support petitioner's claim that he was present at Mayville Farm on most days when he was not out of the country. Petitioner's location on any particular day cannot be proved from an examination of those bills. He may have been in New York City, as well as at Mayville Farm, on a day when telephone calls were placed to Sweden, the Bahamas and other

locations outside the United States. However, the general pattern of use shown in those bills is consistent with petitioner's claim that he conducted business from Mayville Farm when he was not abroad. The volume of calls placed to foreign telephone numbers (primarily in Sweden) increased dramatically during the periods when petitioner was in the United States. In the month for which an analysis was made, October 1991, a comparison of the volume of calls made from the Park Avenue apartment and Mayville Farm is consistent with petitioner's claims regarding time spent in and out of New York City. The Division states that the identity of the person making these telephone calls is unknown. But Mr. Quinn states that whenever petitioner was in residence at Mayville Farm he spent his mornings making business calls.

G. Evidence gathered by the Division on audit does not contradict petitioner's claim that Mayville Farm was his permanent home in 1991. The Division notes that petitioner maintained telephone service at the Park Avenue apartment from 1984 through 1991; that the Park Avenue address was used on petitioner's 1991 tax return and other business and financial documents; that the doorman at the Park Avenue apartment and petitioner's secretary in New York City, Nancy Guavara, confirmed that petitioner lived at the Park Avenue apartment in 1991; that Ms. Guavara told the auditor that the only residence she knew of was the Park Avenue apartment. This evidence only shows that petitioner maintained a residence in New York City in 1991. It does not speak to petitioner's domicile in that year. When the auditor conducted his investigation in 1995, petitioner had already sold the Park Avenue apartment. His ownership of the Mayville Farm preceded and outlasted his ownership of the Park Avenue apartment. Ms. Guevara's and the Park Avenue doorman's ignorance of petitioner's ownership of and residence at the Mayville Farm cannot discredit the documentary evidence that establishes that petitioner did live at the Mayville Farm in 1991.

The Division notes that the telephone listing obtained by the auditor for the Mayville Farm was in the name of petitioner's wife. Again, the auditor's investigation occurred in 1995. Regardless of whether petitioner's name was listed in the Glen Head telephone directory in 1995, billing documents from New York Telephone and AT&T prove that the telephone account was in petitioner's name in 1991.

The evidence regarding the auditor's conversation with persons at Mayville Farm is inconsistent and confusing; therefore, no weight could be given to it. The auditor testified that he was told by two persons that Mr. Stenbeck did not reside at Mayville Farm. In his contemporaneous log, he recounts being told that petitioner was "outside this country for vacation" and would return in September. In a separate document, the auditor repeated being told that petitioner would return in September, but this time he was told that petitioner did not reside at Mayville Farm and could be reached at his New York City office. The evidence does not disclose whether the auditor asked to speak with Mr. or Mrs. Stenbeck, revealed his own name and the purpose of his call, or inquired about petitioner's residence in 1991. The auditor did not obtain the names of the persons to whom he spoke or their relationship to the Stenbecks. Accordingly, these conversations are of little value in determining whether petitioner made his permanent home at the Mayville Farm in 1991.

H. The Division makes several other arguments. It claims that the affidavits submitted by petitioner are contradicted by the day count prepared by petitioner to establish that he was present in the United States on fewer than 183 days. The day count shows that petitioner was present in New York City on 109 days; therefore, the Division argues, petitioner could not have spent most of his time at Mayville Farm in 1991. In addition, the Division argues that the fact that petitioner returned to New York City after each absence demonstrates an intent to make New

York City his domicile. Petitioner's position as the director of several corporations headquartered in New York City at 153 East 53rd Street is cited by the Division as evidence of petitioner's active participation in and management of businesses located in New York City. Finally, the Division argues that petitioner failed to provide sufficient evidence to show a change of domicile to Mayville Farm. As examples of information not provided it lists: "the address recorded on [petitioner's] driver's licenses, bank account records, credit cards, wills, safe deposit boxes, insurance, voter registration, New York City parking exemption and auto registration [and] *active* membership in any clubs or organizations" (Division's brief, p. 15-16). These arguments are not persuasive.

Petitioner's day count shows that he spent 109 days in the United States in 1991. With the exception of some Saturdays and Sundays, the day count shows that petitioner was present in New York City on all of these days. Petitioner points out that the day count was prepared based primarily on petitioner's passport for the purpose of establishing that he was present in the United States on fewer than 183 days and not as evidence of domicile. Moreover, petitioner's presence in New York City on a particular day does not preclude a finding that he was also present at Mayville Farm. The sharp increase in the number of long-distance telephone calls placed from Mayville Farm when petitioner was not traveling abroad supports his claim that he was at Mayville Farm, conducting business by telephone, on almost all of the days that he was present in the United States.

Petitioner's business interests in New York City do not demonstrate a New York City domicile. As petitioner points out, it is common for individuals to work in New York City and maintain a home in the suburbs. This arrangement is quite different from those in which taxpayers claim to have retired and moved to Florida while actively participating in the daily

operations of their New York business (*see, Matter of Kartiganer*, Tax Appeals Tribunal, October 17, 1991, *confirmed Matter of Kartiganer v. Koenig*, 194 AD2d 879, 599 NYS2d 312; *Matter of Clute v. Chu*, 106 AD2d 841, 484 NYS2d 239; *see also, Matter of Smith*, Tax Appeals Tribunal, July 23, 1998).

Petitioner's failure to submit additional evidence as proof of domicile does not discredit the evidence that was submitted.

I. The petition of Jan Hugo Stenbeck is granted, and the Notice of Deficiency, dated September 11, 1995, is canceled.

DATED: Troy, New York
September 9, 1999

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE